

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County
Steven H. John, Circuit Court Judge

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SC SUPREME COURT

SHANNON MCGEE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE # 2014-000297

REPLY TO STATE'S RETURN TO
RE-PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX..... 1

ARGUMENT IN REPLY2

 A. Petitioner Was Prejudiced By The Solicitor’s Tactical Calling Of His Case For Trial When Trial Counsel Was Unprepared, Evidenced By The Section Of Counsel’s Trial Notebook Titled “Trial Counsel’s Lack Of Preparation,” Counsel’s Unawareness Of Witness Kinloch’s Pending Charges And Letter To The Solicitor, And Counsel’s Failure To Interview Witness Jones2

 B. The Solicitor’s Misconduct Was Properly Raised On Collateral Review.....5

 C. The Unconstitutionality Of The “No-Corroboation Charge” Is Not A Prerequisite To A Finding That Counsel Was Deficient In Failing To Oppose Such A Charge And There Was No Articulated Or Valid Strategy For Counsel’s Failure To Oppose The Charge6

 D. The Solicitor’s Implicit Argument That Minor Child 2 Knew More Than He Was “Allowed To Say” Was Improper Vouching And Bolstering Such That Trial Counsel Was Ineffective In Failing To Object9

CONCLUSION 11

ARGUMENT IN REPLY

A. Petitioner Was Prejudiced By The Solicitor's Tactical Calling Of His Case For Trial When Trial Counsel Was Unprepared, Evidenced By The Section Of Counsel's Trial Notebook Titled "Trial Counsel's Lack Of Preparation," Counsel's Unawareness Of Witness Kinloch's Pending Charges and Letter to the Solicitor, And Counsel's Failure To Interview Witness Jones

McGee was prejudiced by the solicitor's control of the docket in that his attorney was not prepared for trial. Respondent places great emphasis on trial counsel Axelrod's trial notebook as evidence that "trial counsel was thoroughly prepared for trial despite the short notice," as did the PCR court. Respondent's Return, pp. 8, 13; see also App. 590 and 596. A review of the trial notebook, which appears to have been assembled by a member of Axelrod's staff, reveals that it was primarily comprised of court documents and documents provided in discovery. There are no notes indicating that any interviews were conducted with McGee or any other witnesses or that any pre-trial preparation was made for voir dire, opening statements, examination of witnesses, or closing argument. App. 441 – 517 (Applicant's Ex. 1, Trial Notebook).

Axelrod was, however, prepared to argue for a continuance, evidenced by the section of the notebook labeled "**Re: trial counsel's lack of preparation.**" App. 515. It is difficult to imagine how a notebook with such a section can reasonably be used as evidence of counsel's readiness for trial. Within that section are letters between Axelrod and former deputy solicitor Bryan dated September 15, 2006, the Friday before McGee's Monday trial. Axelrod's letter expressed that he was "not ready for the Shannon McGee trial" and requested that it be rescheduled. App. 517 (Letter from Axelrod). The solicitor responded with a haughty denial of that request, indicating that Axelrod should have prepared the case for trial every time it was placed on the roster by the solicitor. App. 516 (Letter from deputy solicitor). Thus, contrary to Respondent's contention and the PCR court's findings, the trial notebook evidences trial counsel's **lack of preparation**. Further,

Axlerod testified at the PCR hearing that McGee's trial was an "ambush" and that he was unable to meet with McGee in the week preceding the trial, as would have been his usual practice. App. 379, l. 22 – 381, l. 9.

Obviously trial counsel did not "throw in the towel" and refuse to participate in the trial when the motion for continuance was denied. See Return, p. 8. However, the fact that Axlerod questioned witnesses does not obviate any finding of prejudice to McGee from the solicitor's control of the docket and does not immunize Axlerod from a finding of ineffective assistance of counsel. The evidence that would have been uncovered had counsel had additional time to prepare included a proper understanding of Aaron Kinloch's incentive to lie and the testimony of witness Michael Jones. The trial transcript is clear that **the solicitor knew about Kinloch's pending charges** even though they did not appear on the NCIC. App. 24, l. 22 – 26, l. 20. Thus, contrary to Respondent's contention, Petitioner is not arguing "that the solicitor should have known that Kinloch had pending charges that were not listed on the NCIC report." Return, p. 11. Rather, when it became apparent that trial counsel and the trial court were under the misapprehension that Kinloch's charges had all been resolved, the solicitor had a duty to correct them. See Re-Petition, pp. 17-20.

While Kinloch's prior convictions pursuant to Rule 609, SCRE, were relevant to his general lack of credibility, the admission of Kinloch's **pending charges** pursuant to Rule 608, SCRE, would have been even more probative of his present incentive to testify falsely in McGee's case. In State v. Sims, this Court found that Sim's defense counsel was improperly limited to asking a witness only whether he had pending charges and whether there was anything promised him with regard to those pending charges. 348 S.C. 16, 24-26, 558 S.E.2d 518, 522-23 (2002). The trial court in Sims had precluded defense counsel from asking the witness about what specific

criminal charges were pending against him. Id. The Sims Court held that the “the excluded evidence had ‘a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity’ of [witness] Peterson’s testimony.” Id. (quoting State v. Jones, 343 S.C. 562, 570, 541 S.E.2d 813, 817). In the present case, not only the nature but **the existence of Kinloch’s pending charges** and letter to the solicitor were **entirely unknown to the jury**. App. 100 – 107; App. 109 – 119. The PCR court’s contrary finding that “[t]he jury was aware of Kinloch’s prior conviction and **pending charges**” is not supported by any evidence. App. 593 (emphasis added).

Trial counsel’s awareness of Michael Jones arose from the State’s witness list, Aaron Kinloch’s testimony on cross-examination, and McGee. App. 116, ll. 4-13; App. 424, l. 22 – 425, l. 9; App. 512 (State’s Potential Witness List). During the trial, Kinloch claimed that McGee had discussed his case with several other people at the jail, including Michael Jones. App. 116, ll. 4-13. While McGee did not know Jones told Kinloch about the solicitor’s search for a “jailhouse snitch” until he saw Kinloch’s letter, McGee did know that the solicitor had approached Jones and asked him to testify against McGee. App. 409, ll. 19 – 410, l. 6; App. 413, ll. 15-21. Based on what information was known to McGee, he told trial counsel Axelrod to contact Jones during his trial. App. 424, l. 22 – 425, l. 9. Based on these three sources, Axelrod should have made an effort to interview Jones. It is reasonable to believe that had Jones been interviewed by Axelrod prior to or during the trial, he would have shared information about his discussions with the solicitor and Kinloch. Not only could Axelrod have called Jones as a witness at trial, but he would have been better equipped to impeach Kinloch.

B. The Solicitor's Misconduct Was Properly Raised on Collateral Review

Respondent contends that the PCR court properly determined that McGee was barred from raising an issue regarding prosecutorial misconduct on collateral review because it was already ruled upon in McGee's direct appeal. The issue raised on direct appeal was whether the trial court erred in denying McGee's motion for a new trial based on the solicitor's failure to disclose witness Kinloch's letter, which demonstrated Kinloch's willingness to make a deal in exchange for testimony. App. 245. The State argued that McGee was not prejudiced by the failure to disclose the letter. App. 257. In its one paragraph opinion, the Court of Appeals affirmed the conviction based on the "abuse of discretion" standard of review and the four factors that a defendant must prove to establish a Brady¹ violation. App. 277. In contrast, the issue on raised at the PCR hearing was whether the solicitor committed prosecutorial misconduct by misrepresenting his relationship with witness Aaron Kinloch.

On direct appeal, the Court was limited to reviewing the argument in support of a new trial presented by trial counsel to the trial judge, which was based solely upon the failure to disclose Kinloch's letter. See State v. Ward, 374 S.C. 606, 649 S.E.2d 145 (2007) (issues raised on appeal must be the same issues raised below); White v. Livingston, 231 S.C. 301, 98 S.E.2d 534 (1957) (party may not argue one ground at trial and an alternate ground on appeal). At the PCR hearing, the court reviewed the trial transcript and heard testimony from McGee, trial counsel Axelrod, and Michael Jones. The solicitor's misrepresentation of his relationship with Kinloch went far beyond the failure to disclose the letter sent to him by Kinloch and the narrow matter considered on direct appeal. The solicitor's examination of Kinloch made it appear that Kinloch had no pending criminal charges, that Kinloch had no motive to lie, and that the solicitor

¹ Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963).

had no knowledge of Michael Jones. See Re-Petition, pp. 17-20. Jones testified at the PCR hearing that his conversation with solicitor Bryan left him with the impression that “he [the] solicitor was trying to get somebody to lie.” App. 407, ll. 14-25; App. 410, ll. 21 – 411, l. 24. Thus, the Brady violation was one portion of the larger issue of prosecutorial misconduct raised at the PCR hearing such that McGee’s direct appeal does not preclude his PCR claim.

C. The Unconstitutionality Of The “No-Corroboration Charge” Is Not A Prerequisite To A Finding That Counsel Was Deficient In Failing To Oppose Such A Charge And There Was No Articulated Or Valid Strategy For Counsel’s Failure To Oppose The Charge

Trial counsel was ineffective in failing to object to the solicitor’s request that the jury be charged that the testimony of a victim in a criminal sexual conduct case need not be corroborated. See Re-Petition, pp. 25-27. Respondent misunderstands Petitioner’s argument as “call[ing] for a change in the law.” Return, p. 15. While this Court’s recent holding that the “no corroboration charge” is unconstitutional, announced in State v. Stukes, Op. No. 27633 (S.C. Sup. Ct. filed May 4, 2016) (Shearouse Adv. Sh. No. 29 at 25), is helpful to Petitioner’s claim, such a change in the law is not necessary in order to find that trial counsel’s conduct was deficient. In State v. Rayfield, the Court held: “**A trial judge is not required to charge § 16–3–657**, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law.” 369 S.C. 106, 117-18, 631 S.E.2d 244, 250 (emphasis added). Thus, Rayfield did not amount to a mandate that a “no corroborator charge” be given in every case involving an allegation of criminal sexual conduct.

Of course, if there is no objection from trial counsel, it is unlikely that the trial judge would refuse the State’s request for such a charge *sua sponte*. Here, trial counsel’s acquiescence to the charge was improper because the charge is misleading to the jury and places undue emphasis on the victim’s testimony. See Re-Petition, pp. 25-27. The trial judge was never given an opportunity to consider the well-reasoned arguments against giving such a charge, many of which were articulated by the dissent in Rayfield. 369 S.C. at 118-21, 631 S.E.2d at 251-52.

Respondent also contends that the failure to object “certainly could have been” “part of his [trial counsel’s] strategy.” Return, p. 16. However, **no strategy** was articulated by counsel and

Petitioner cannot fathom **any reasonable** defense strategy that would benefit from a charge to the jury that the victim's testimony need not be corroborated. See Gilchrist v. State, 350 S.C. 221, 228 n.2, 565 S.E.2d 281, 285 n.2 (2002) ("Although the PCR court found counsel failed to object for strategic reasons, we note counsel never **articulated** any strategy at all. A blanket statement by counsel at a PCR hearing that he employed "strategy" does not automatically insulate the lawyer from being found ineffective. Consequently, there is no evidence to support the PCR court's finding that any valid strategic reason existed for the failure to object."(emphasis in original)); Sanchez v. State, 351 S.C. 270, 276, 569 S.E.2d 363, 366 (2002) (finding trial counsel's purported strategy for failing to object to hearsay testimony was "not reasonable given the prejudicial effect this testimony had on Sanchez."); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) ("Where counsel articulates a strategy, it is measured under an objective standard of reasonableness.").

D. The Solicitor's Implicit Argument That Minor Child 2 Knew More Than He Was "Allowed To Say" Was Improper Vouching And Bolstering Such That Trial Counsel Was Ineffective In Failing To Object

During his closing argument, the solicitor went beyond arguing the credibility of the witnesses when he said:

[A]nd when she told her little brother he told, and so we find ourselves here, and [Minor Child 2] came in. There's rules which allow certain things in, so basically he was just allowed to talk about time and place, based on the rules, so **that's why he said that she said somebody** did something nasty her in that trailer, and **that's what, basically, he is allowed to say.**

App. 152, ll. 2-8 (emphasis added); see Re-Petition, pp. 28-29. Respondent argues: "If the solicitor were alluding to anything outside of the record, it would be information that any reasonable person could assume exists, such as the fact that the victim most likely told Minor Child 2 exactly who had done something to her." Return, p. 17.

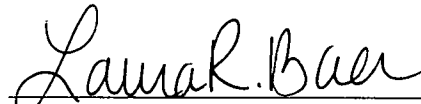
"The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001). One exception to the rule allows limited corroborative testimony in criminal sexual conduct cases when the victim testifies. Id.; Rule 801(d)(1)(D), SCRE. Under such circumstances, evidence from other witnesses that the victim complained of the sexual assault is admissible in corroboration; however, such evidence is **limited to the time and place of the assault and cannot include details or particulars.** Dawkins, 346 S.C. at 156, 551 S.E.2d at 262. "Any other details or particulars, **including the perpetrator's identity**, must be excluded." Watson v. State, 370 S.C. 68, 71-72, 634 S.E.2d 642, 644 (2006) (emphasis added). To allow the solicitor to argue in closing that the witness knows more than time and place, would render the statutory limitation on the corroborating witness' testimony meaningless.

In Sanchez v. State, the victim's mother and father both testified that their daughter told them about specific acts committed against her by Sanchez. 351 S.C. 270, 273-74, 569 S.E.2d 363, 364 (2002). An officer also testified that she asked victim to demonstrate what happened with Sanchez using anatomical dolls, in response to which the victim demonstrated various sex acts. Id. at 274, 569 S.E.2d at 364-65. At the PCR hearing, trial counsel testified that he failed to object because the parents' testimony "did not bolster the victim's testimony" and the victim's statements to the officer were "vague." Id. The Sanchez Court found that trial counsel was ineffective in failing to object to the hearsay testimony. Id. at 275, 569 S.E.2d at 365-66. Sanchez was prejudiced because the testimony impermissibly bolstered the victim's testimony. Id. Thus, in the present case, Axelrod would have been ineffective had Minor Child 2 himself testified that the victim told him that McGee assaulted her and he failed to object. See Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) (holding trial counsel was ineffective in failing to object to improper corroboration testimony); Sanchez, supra (same); Ingle, supra (same); Dawkins v. State, supra (same); Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994) (same); Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013) (same). Trial counsel's failure to object to the equivalent of impermissible corroboration testimony through the solicitor's argument was equally improper. See Re-Petition, p. 28-29.

CONCLUSION

For the reasons set forth herein and in the Re-Petition for Writ of Certiorari, Petitioner Shannon McGee respectfully requests this Court grant certiorari to allow full briefing on the issue raised in his Petition.

Respectfully submitted,

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of May, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Steven H. John, Circuit Court Judge

SHANNON MCGEE,

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RESPONDENT

APPELLATE CASE # 2014-000297

CERTIFICATE OF SERVICE

I certify that a true copy of the Reply to State's Return to Re-petition for Writ of Certiorari in this case have been served on Jessica Kinard, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Shannon McGee, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 12th day of May, 2016.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of May, 2016.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.